

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16

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CASE NO. 16-RC-262896

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AIRGAS USA, LLC,

Employer,

and

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 745,

Petitioner.

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**AIRGAS USA, LLC'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S  
DECISION AND DIRECTION OF ELECTION TO THE NATIONAL LABOR  
RELATIONS BOARD**

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COMES NOW for the Respondent Airgas USA, LLC (“Airgas” or the “Employer”), by its attorneys, and, pursuant to the 2019 Amendments, under § 102.66(H) and 102.69(2) of the Rules and Regulations of the National Labor Relations Board (“Board”), and as supported by the General Counsel’s Memorandum GC 20-07<sup>1</sup>, files this Request for Review of the Regional Director’s Decision and Direction of Mail-Ballot Election dated August 27, 2020.<sup>2</sup> The Board should grant Airgas’ Request for Review because the Regional Director abused his discretion in ordering a mail-ballot election and erred in finding that International Brotherhood of Teamsters, Local 745’s (“Union”) petitioned-for unit, consisting of “[a]ll full-time and regular part-time Drivers employed at the Employer’s Grand Prairie<sup>3</sup>, Texas facility” is appropriate. The Regional Director’s significant erroneous factual findings and his departure from officially reported Board precedent, prejudice Airgas, interfere with the rights of Airgas employees, and raise substantial questions of law and policy.

In finding that drivers from two separate departments – the Distribution and Production departments at Airgas’ Grand Prairie plant – constitute an appropriate unit and that a mail ballot is appropriate, the Regional Director:

1. Ignores the National Labor Relations Act (“Act”) and Board precedent that prohibits fractured units;
2. Departs from Board precedent and record evidence in failing to find that a multi-site unit of Production and Distribution employees who collectively comprise the

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<sup>1</sup> Please note that in conjunction with this Request for Review, the Employer filed an Emergency Motion to Stay the Election on September 7, 2020.

<sup>2</sup> Citations to pages in the Decision and Direction of Election are “Decision at \_\_\_\_.”

<sup>3</sup> As discussed in more detail below, the petitioned-for unit includes employees from two separate departments at Airgas’ Grand Prairie plant, and improperly excludes other Airgas employees from both departments with whom employees in the petitioned-for unit share a community of interest. In addition, at the hearing, the Petitioner sought to modify its petition to include a Class C Retail Driver. Bd. Ex. 1. There was presented no record evidence concerning the Retail Driver and the Regional Director’s Decision fails to discuss the specific position in the Decision. The Employer had no notice of the union’s change in position and could not respond at that time. References to the hearing transcript will be referred to as “Tr.,” followed by the appropriate page number(s). References to exhibits introduced into evidence at the hearing are designated by the exhibit number, preceded by “Bd. Ex.” for the Board’s exhibits, and “E. Ex.” for Airgas’ exhibits.

Airgas' North Texas area operation was the only appropriate unit for representation; and

3. Abuses his discretion and errs in ordering a mail ballot election despite Board precedent and a GC memorandum supporting a manual ballot election, and the parties' stipulated agreement to a manual ballot election, following appropriate COVID-19 safeguards.

As fully discussed below, the Board should grant the Employer's Request for Review because the Regional Director's Decision ignored and misapplied controlling precedent. In addition, the Regional Director made findings that were either unsupported by, or contrary to, the testimony and documentary evidence admitted at the hearing. Contrary to the conclusions reached in the Regional Director's Decision, the record testimony and controlling case law demonstrate, that the petitioned unit of drivers from different departments and at a single location is a fractured unit; and any unit that includes the petitioned-for employees must include a multi-site unit, including Distribution and Production employees from Airgas' Grand Prairie, Fort Worth, and Dallas plants. Moreover, a manual ballot, as stipulated by the parties, is appropriate, and the Regional Director's order of a mail ballot was an abuse of discretion and contrary to Board precedent and recent guidance from the General Counsel.

Because the Union declared that they are only interested in moving forward with the petitioned-for fractured unit, and thus disclaimed interest in an election if the Regional Director found any other unit appropriate, the Board should find the Decision in error and dismiss the petition. Bd. Ex. 2.

## **I. STATEMENT OF THE CASE**

On July 13, 2020, the Union filed a representation petition seeking certification as the exclusive bargaining representative of the following unit at Airgas operation located in Grand Prairie, Texas:

Employees Included:

## Drivers Class A and B

### Employees Excluded:

All other employees, office clerical employees, professional employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

(Bd. Ex. 1(a)). The petition requested a manual ballot election.

The Employer disputed the appropriateness of the petitioned unit of employees, but agreed that a manual ballot election is appropriate. (Bd. Ex. 1) On July 31, August 3 and 4, 2020, the Region conducted a hearing over the disputed unit<sup>4</sup>.

At the hearing, the Employer asserted that the petitioned-for unit was not appropriate because it was fractured. The Employer also asserted that due to the highly integrated nature of the Airgas North Texas Area operations between its Grand Prairie, Fort Worth, and Dallas plants, and the community of interests shared by the drivers and Production employees at all three facilities, the only appropriate unit is a multi-site unit composed of the Drivers (Delivery, Microbulk,, and Interbranch Drivers) and Production (Production Operator I<sup>5</sup>, Production Operator II<sup>6</sup>, Production Operator III, Production Lead, Operations Coordinator, and Lab Technician) employees. On August 21, 2020 Airgas and the Union filed Post-Hearing Briefs.

On August 27, 2020, the Regional Director issued the Decision and Direction of Election finding the petitioned unit appropriate, rejecting Airgas' contention that the petitioned unit is

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<sup>4</sup> During the three-day hearing Airgas presented testimony from Jason Merideth ("Merideth"), Area Distribution Manager for North Texas; Brenda Vance ("Vance"), Human Resources ("HR") Director for the Southwest Region; Robert Squibb ("Squibb"), Safety and Compliance Specialist for the Southwest Region; Joshua Chop ("Chop"), Plant Manager for the Grand Prairie plant; Rosendo Espino ("Espino"), Plant Manager for the Fort Worth plant; Jason Dunlap ("Dunlap"), Lab Technician at the Grand Prairie plant; and Erik Perez ("Perez") Production Operator II at the Fort Worth plant. Airgas presented approximately 524 pages of documents. The Petitioner presented one Class B driver as its only witness. (Tr. 813).

<sup>5</sup> Also referred to as Loaders.

<sup>6</sup> Also referred to as Fillers.



inappropriate and that the unit of North Texas area Production and Distribution employees was an appropriate unit. The Regional Director also rejected the stipulated agreement of the parties that a manual ballot election was appropriate. The Regional Director erred in departing from Board precedent and in basing the decision upon findings that are either not supported by, or are contrary to, the credible and substantial record evidence.

## **II. AIRGAS' POSITION**

When a union submits a petition for a representation election, the Board first looks to the unit sought by the union to determine whether it is appropriate. *Cleveland Const., Inc. v. NLRB*, 44 F.3d 1010, 1013 (D.C. Cir. 1995). If the unit is appropriate, the Board's inquiry ends. *Id.* A bargaining unit determination, however, will not stand if arbitrary and without substantial evidence. *International Bhd. of Elec. Workers, Local 474 v. NLRB*, 814 F.2d 697, 707 (D.C. Cir. 1987). Thus, the first step of the Board's analysis is to determine whether the unit petitioned by the union is appropriate.

Here, the Union failed to petition to represent an appropriate unit, and the Regional Director's finding that the Union's petitioned-for unit is appropriate is contrary to Board precedent.

### **A. The Regional Director's Decision is Inappropriate Because It Creates a Fractured Unit and Fails to Analyze the Overwhelming Community Of Interest Of Employees.**

#### **1. The Board has consistently held fractured units as inappropriate.**

The Board has long held that "[a] petitioner cannot fracture a unit, seeking representation in an "arbitrary segment" of what would be an appropriate unit. The Board does not approve fractured units, *i.e.*, combinations of employees that ... have no rational basis." *Odwalla, Inc.*, 357 NLRB 1608,1612 (2011) (citing, *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999) and *Seaboard Marine*, 327 NLRB 556 (1999). Even under the now overruled *Specialty Healthcare* standard the Board held "the community of interest standard focuses almost exclusively on how

*the employer* has chosen to structure its workplace.” *Specialty Healthcare*, 357 NLRB 934, 942 fn. 19 (2011) (emphasis by Board). Hence, in *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, the Board found inappropriate a petition seeking to represent a unit of all women’s shoe sale associates at a retail store where the sales associates were located with two separate departments within the store. 361 NLRB 50 (2014). While the Board found some factors favoring a community of interest, those factors were ultimately outweighed “by the lack of any relationship between the contours of the proposed unit and any of the administrative or operational lines drawn by the Employer...” *Id.* at 53. The Board’s rationale is equally compelling in this case.

**2. Undisputable record evidence supports the Employer’s contention that the unit, as accepted by the Regional Director, is fractured.**

Here, the irrefutable evidence shows the same to be true of the instant petition -- the union seeks to represent all drivers in Distribution and some drivers in Production - a unit that lacks any relationship to the administrative or operational lines drawn by Airgas at its Grand Prairie plant, one of three highly interrelated plants in Airgas’ North Texas Area. The Regional Director’s decision pays little more than lip service to this fact and obscures it with erroneous findings and reliance upon irrelevant evidence.

The record contains many examples of how Distribution drivers (local Delivery drivers and Microbulk drivers) report to Airgas’ Distribution department, and Interbranch drivers report to Production and fulfill a different purpose. (Tr. 26, 91-92, 96-97, 154, 156, 188, 579, 588, 595). The Regional Director, however, ignored this testimony and with no explanation found that such differences were “negligible.” Decision at 22. The Regional Director obscured this important distinction by repeatedly, and in error, referring to “Drivers” collectively and “Production employees.” Decision at 16.

For example, at one point the Regional Director incorrectly declares: “the petitioned-for drivers are part of the Employer’s Distribution operations and the Production employees sought to be included by the Employer are part of production operations.” Decision at 23. At another point, the Regional Director correctly acknowledges that Interbranch drivers (included in the Union’s petitioned-for unit)<sup>7</sup> report to the Grand Prairie Plant manager Joshua Chop (*i.e.*, Production). Decision at 22. Ultimately, the Regional Director ignores the uncontested evidence establishing that the two Interbranch drivers at Airgas’ Grand Prairie plant are Production department employees. (Tr. 59, 282, 289-90, 545). Indeed, the Regional Director even cites to the fact that the Interbranch drivers were reorganized under Production in February, 2020 (Decision at 22) a fact that bears no relevance on the operation today – as some obscure rationale to ignore the clear evidence and Board precedent that the unit petitioned is legally inappropriate.

**3. The Regional Director’s Reliance Upon *Home Depot* to Justify His Decision is Misplaced.**

In an apparent effort to reject the Board precedent cited by Airgas, the Regional Director’s Decision summarily stated: “in certain circumstances the Board will approve a unit even though other employees in the same administrative grouping are excluded.” Decision at 21 (citing *Home Depot USA*, 331 NLRB 1289, 1289-91 (2000)). The Regional Director’s reliance on *Home Depot* is misguided. In *Home Depot*, the petitioning union sought a driver and dispatcher unit separate from the employer’s non-driver employees. In finding the petitioned-for unit appropriate, the Board highlighted several factors, including: (1) the drivers and non-drivers **did not** work alongside each other or in close proximity, (2) non-drivers did not perform driving work, and (3) the drivers possessed special licensing and were subject to special testing. *Id.* at 1291. The record

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<sup>7</sup> The Regional Director incorrectly notes there is only a single Interbranch driver at the Grand Prairie plant. There are two. (Tr. 572-73). The Regional Director also incorrectly notes there are two Microbulk drivers at the Grand Prairie plant; there are five.

evidence in this case is significantly different. The Regional Director fails to address the issues that Airgas highlighted in its Post-Hearing brief:

- (1) Unlike *Home Depot*, the petitioned-for unit in the instant case features drivers from two separate departments – Distribution and Production. (Tr. 25-26, 98, 282, 289-90, 368, 569-70; E. Ex. 1);
- (2) In contrast to *Home Depot*, the record in the present case featured numerous examples of the daily interaction between drivers (both in Distribution and Production) and other Production employees (Tr. 342, 478, 692, 730, 732, 742, 843-844) – interactions that are functionally required on a daily basis, for significant time;
- (3) Here, the record evidence shows that the drivers (both Production and Distribution) have greater daily functional interaction with the other Production employees (outside the petitioned unit) than they do with other Distribution or Production drivers. (Tr. 342, 478, 692, 730, 732, 742, 843-44). Indeed the record is nearly void of any record evidence concerning any daily interaction between the Distribution and Production drivers, as they have different work schedules, they pick up their paper work and clock in a different locations, and drive different vehicles.
- (4) Regarding skills and qualifications common to Distribution and Production employees, even the Regional Director acknowledged that all Distribution and Production employees are forklift certified (Tr. 47-48, 60, 260, 744, 769, 779-80, 842) and receive significant common training regarding the loading and handling of gasses (E. Ex. 13, Decision at 15). The Regional Director, however, fails to consider the significant record evidence of how Production employees and drivers (within both Production and Distribution departments) work on the same trucks, handle the same tanks, operate the

same lifts, check the same loads for Airgas and regulatory compliance, and reconciliation of loads and deliveries at the beginning and end of every shift. (Tr. 342, 692, 478, 730, 732, 742, 843-44). The Regional Director also fails to mention that a Lab Technician (i.e. Production employee) moves trucks and trailers typically operated by Distribution drivers.

See Decision at 5; (Tr. 476-78), *see* Airgas' Post-Hearing Brief at 8-9. In short, the facts of *Home Depot* are inapposite to those of this case. Indeed, the *Home Depot* Board acknowledged that the question of whether a unit of drivers separate from non-drivers constitutes an appropriate unit is highly fact dependent. *Id.* at 1290. The facts in this case support the inclusion of all Production employees.

**4. The Regional Director's Analysis is Essentially Void of the *Boeing* Community of Interest Analysis as Related to the Drivers and Production Employees at the Grand Prairie Location.**

While it is true that the Act does not require that the unit be the "only appropriate unit" or the "most appropriate unit," the Board must first determine that the unit petitioned for "is appropriate." *Cleveland Const., Inc.*, 44 F.3d at 1013. The requirement that the Board ascertain the appropriateness of the unit was intended by Congress "to prevent fragmentation of appropriate units into smaller inappropriate units." *Overnite Transp. Co.*, 322 NLRB 723, 725 (1996). In determining the appropriateness of the unit, the Board applies the traditional community of interest standard, which was originally set forth in *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962), further outlined in *In re United Operations, Inc.*, 338 NLRB 123 (2002), and reinforced by *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017).

As held in *PCC Structurals*, "applying the Board's traditional community-of-interest factors, the Board will determine whether the petitioned-for employees share a community of

interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.” *PCC Structurals* at \*7. In *The Boeing Co.*, the Board further refined the *PCC Structurals* analysis into a “three-step process for determining an appropriate bargaining unit under our traditional community-of-interest test.” *The Boeing Co.*, 368 NLRB No. 67, slip op. (Sep. 9, 2019). In this case, the Regional Director failed to follow this three-step analysis.

First, the Board evaluates whether the petitioned-for unit shares an internal community of interest. If “the interests shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit,” the unit is inappropriate. *Boeing*, 368 NLRB No. 67, at slip op. \*3. Second, the Board considers whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” *Id.* As the Board observed in *Boeing*, a “fractured unit” is one example of a unit in which the meaningfully distinct interests of the excluded employees do not outweigh their similarities with the petitioned-for unit. Finally, the Board considers “guidelines that the Board has established for specific industries with regard to appropriate unit configurations.” *Id.* At slip op. \*4. If the Regional Director had properly applied this analysis, he would have found the petitioned unit inappropriate, as the exclusion of other Production employees from the petitioned unit is improper.

At the first and second steps of the three-step process, the Board considers its traditional community-of-interest factors, including whether the employees:

- Are organized into a separate department;
- Have distinct skills and training;
- Have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications;

- Are functionally integrated with the Employer's other employees;
- Have frequent contact with other employees;
- Interchange with other employees;
- Have distinct terms and conditions of employment; and
- Are separately supervised.

*PCC Structural*s, slip op. at \*11 (quoting *United Operations, Inc.*, 338 NLRB at 123).

**a. The Region Erred in Finding the Petitioned-For Unit Shares an Internal Community of Interest.**

Here, the Regional Director improperly found that the petitioned-for unit shares an internal community of interest. The Regional Director permitted the Union to create a unit consisting of drivers from two separate departments, Distribution (local Delivery drivers, Microbulk drivers, and retail drivers) and Production (two Interbranch shuttle drivers), who **do not have common supervision** except at a high (i.e. North Texas Area) level, and who perform different functions. (Tr. 115). Further, their job functions differ in that the Distribution drivers primarily *deliver* to external Airgas clients, while the Interbranch shuttle drivers deliver product *solely* to Airgas plants and retail stores in the North Texas Area. Finally, the Regional Director ignored evidence that Delivery drivers interact with Production employees with far more frequency than they interact with other Delivery drivers, let alone the Interbranch drivers. The following facts acknowledged in the Regional Director's own decision are illustrative:

Production Drivers and Distribution Drivers:

- Work in different departments (Tr. 26, E. Ex. 1, Decision at 7-9);
- Have different supervisors (Tr. 26, 692; E. Ex. 1, Decision at 7-9);
- Operate different trucks and equipment (Tr. 45, Decision at 7-9);
- Are qualified to operate different vehicles (Tr. 45, Decision at 7-9);
- Work on different shifts (Tr. 60-61, Decision at 8-10);

- Focus on different operational needs (*e.g.*, deliveries to customer versus deliveries to other Airgas other plants and facilities) (Tr. 56, 59, Decision at 7-9);
- Are paid differently (hourly rate) (Tr. 461, Decision at 25);
- Have no functionally-required daily interaction (Tr. 59, 891, Decision at 23); and
- Perform work that is not functionally integrated (Tr. 59, 891, Decision at 7-9).

Based on these facts, as recognized in the Regional Director's Decision, he should have found that the Delivery drivers and Interbranch drivers do not share an internal community of interest – to the contrary, the Interbranch drivers share more commonalities with other Production employees, including common department and supervision. Indeed, Distribution and Production workers share locker rooms, cafeterias, and break rooms. (E. Ex. 4, 6-7). At Grand Prairie, Distribution and Production workers comingle in a break room and in general, in the yard. (Tr. 173, 176-81). These interactions happen daily. (Tr. 181).

While the Regional Director found that the exclusion of other Production employees was proper, the Production Drivers (Interbranch drivers) and other Production Employees sought to be included by the Employer all have the following and more in common:

- Work in the same department (Tr. 25-26, 98, 282, 289-90, 368, 569-70; E. Ex. 1);
- Maintain common supervision (Tr. 115, 539);
- Perform functionally integrated work (Tr. 342, 478, 692, 730, 732, 742, 843-44);
- Share common benefits (Tr. 428);
- Must complete extensive common training (Tr. 325:7-13, 327-28, 367, 373, 386-98, 400, 409, 414, E. Ex. 13, 14, 16);
- Share common break areas (Tr. 173, 176-81, E. Ex. 6);
- Share common dressing/locker facilities (Tr. 410-11; E. Ex. 4, 6-7);
- Share common work areas (Tr. 132; E. Ex. 6);
- Share same equipment (Tr. 53, 56);
- Are functionally-required to engage in daily interactions (Tr. 342, 478, 692, 730, 732, 742, 843-44); and
- Must abide by the same Airgas policies and rules (Tr. 325:7-13, 327-28, 367, 373, 386-98, 400, 409, 414; E. Ex. 16).



In his Decision, the Regional Director sidestepped the substantial evidence demonstrating how the petitioned-for unit fails to have meaningfully distinct characteristics from employees outside the petitioned-for unit. The following illustration demonstrates these facts and un rebutted record evidence of the substantial commonality between the Distribution and Production employees at Airgas' Grand Prairie plant:

Skills and Training	Distribution Department: Local drivers and Microbulk drivers	Production Department: Interbranch drivers	Production Department: Production Operator I, Production Operator II, Production Operator III, Production Lead
Airgas Drivers Training Manual	X	X	X
Airgas HM126f Curriculum	X	X	X
DOT specific training – <b>53 separate training modules</b>	X	X	X
Forklift certification	X	X	X

(Tr. 250-51; E. Ex. 13-14). While the Regional Director appeared to distinguish all drivers (including Distribution and Production drivers) from Production employees, the distinction is a fallacy, unsupported by the record.

The record illustrated numerous factors that distinguish Distribution drivers from each other, and from Interbranch drivers:

- Class A drivers can drive everything from a combination tractor-trailer to a box truck, including Microbulk vehicles. (Tr. 45-46).
- In contrast, Class B drivers can only operate a box truck or a straight truck or a bobtail truck. Class B drivers are unable to operate Microbulk vehicles. (Tr. 871-72, Decision at 7-9).

- Interbranch drivers have different start times than the Delivery and Microbulk drivers. (Tr. 70-71).
- Interbranch shuttle drivers have limited interaction with Delivery drivers. (Tr. 546, Decision at 7-9).

The Regional Director's Decision incorrectly omits these commonalities and distinctions from his analysis. Accordingly, the Regional Director erred in his findings.

**b. The Region Erred in Finding the Excluded Employees Have Meaningfully Distinct Interests in the Context of Collective Bargaining that Outweigh Similarities with the Petitioned-For Unit.**

The second prong of the *Boeing/PCC Structural*s three-part analysis requires the Board to determine whether excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh their similarities with the petitioned-for unit. The Region purported to apply the community-of-interest factors, but neglected to address compelling case law cited by Airgas, failed to identify meaningfully distinct interests *in the context of collective bargaining*, and did not explain how the excluded employees' meaningfully distinct interests outweighed their similarities with the petitioned-for unit. Each factor of the community-of-interest analysis is addressed below.

**i. Organization of the Grand Prairie Plant Relative to Airgas' North Texas Area.**

The Regional Director decided that it was appropriate to have a unit consisting of all Distribution drivers and two Interbranch Production drivers – two Production employees - while excluding the remaining Production employees. The unit delineation is not contoured to the organizational structure of the Grand Prairie plant or the North Texas Area operations. Moreover, the Grand Prairie plant is one of three Airgas facilities that form Airgas' North Texas Area. (Tr. 19-21, 26; E. Ex. 2). The three facilities were purchased through mergers and acquisitions, with

the intent of collectively serving Airgas' North Texas customers as efficiently as possible. (Tr. 18, 19-21, 26; E. Ex. 2). Each facility includes a Distribution and Production department, but the facilities share an integrated business purpose and operations. (Tr. 15:6-8, 16:11-14, 17:20-18:8, 23, 114, 389, 536:12-13, 642:14-16; E. Ex. 1).

## **ii. Common Supervision**

The Region found that the lack of common front-line supervision weighed in favor of accepting the petitioned-for unit; however, the petitioned unit found appropriate by the Regional Director lacks common front-line supervision. The Production drivers are commonly supervised with other Production employees. (Tr. 26, 566-70). Common supervision of all Distribution drivers and Production drivers is at a high level, supporting a broader unit. *See Calco Plating, Inc.*, 242 NLRB 1364, 1365 (1979) (holding that drivers and production and maintenance employees were appropriately included in the same unit where they were "directly supervised, in part, by the Employer's vice president [although they did not have the same "immediate" supervision]). Moreover, the Regional Director incorrectly and with no evidentiary support, notes that the fact that the Interbranch drivers report to Production is "negligible." Decision at 22.

## **iii. Employee Skills and Functions**

As Airgas noted in its Post-Hearing Brief, Delivery drivers (within the petitioned-for unit) and Loaders (excluded from the petitioned-for unit) often collaborate to unload trucks, typically working together for at least 45 minutes to complete the unloading process. (Tr. 151, 514, 658-59). The Union's sole witness admitted he regularly interacts with Loaders. (Tr. 843-44). More specifically, the Union's witness testified that in his recollection, he collaborates with Loaders to identify potential issues and updates to his deliveries the majority of his workdays. (Tr. 843-44) The Union's witness further testified at length about his frequent interaction with and dependency on Loaders:

Q: All right. So let's go to the scenario where there's something on your paperwork that's not on the truck. What do you do?

A: If it's on my paperwork and it's not on my truck, I would either ask one of the loaders if I'm getting it, and if they say, no, I'm not getting it, I will usually ask how long it's going to be so I know I'm going to wait for it, or if I'm still going to go ahead and cut it.

Q: Okay. So if it's being cut - - describe the process by which you inform whoever you need to inform that it's going to be cut.

A: I would - - once I find out that it's going to be cut, I would go to [Distribution Coordinator] Ms. Sandy and let her know that it's cut. And then she removes that item from my paperwork.

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Q: And then for the paperwork that's already printed, you just cross it out?

A: No, it would be more paperwork reprint.

Q: Okay. Including the hazmat document?

A: Yes, sir. It has to come off the hazmat, too.

Q: Okay. So when that scenario happens with the loader, and he knows the answer instantly, how long of a process does that take from the time that you realize that something is missing to the time when you go and tell Ms. Sandy that it's got to be cut, and she gives you the new paperwork?

A: If you know right away, that's a two- or three- minutes. The question that you asked, the conversation, and then that's it.

Q: But then you've got to go to Ms. Sandy.

A: Then I've got to go to Ms. Sandy, so that would take another - if there's nobody in front of me, it could take anywhere from five minutes to twenty minutes.

(Tr. 843-44). Grand Prairie Production Plant Manager Chop discussed how much collaboration takes place between Loaders and Delivery drivers on a daily basis, noting:

A: From when the Driver pulls in [in the early afternoon], until I leave for the day about 6:00 - - you know, when the first Driver pulls in, that is when I go out there and then I spend the rest of my afternoon in the yard.

Q: Okay. So everything you are doing is what the Loader would be doing.

A: Correct.

(Tr. 692). Safety Specialist Squibb corroborated this statement, and further illustrated the highly integrated nature of the interaction between the drivers, Loaders, and fillers:

- Q: Are you familiar with the process or the handoff between a loader and a driver?
- A: Yes.
- Q: Would you say there was -- was it your impression that there was a very defined line between those two jobs or tasks?
- A: Yes. I mean, yes. There are certainly boundaries to what they do primarily. But **there is an overlap in the handoff**. After the truck is loaded and when the driver leaves . . . for the day, then once again there's that contact when they get back. You know, certainly while one is a driver, he's out on the road making deliveries. The two roles compliment themselves in that **the drivers at our plants depend on loaders to have their products ready and loaded, and then subsequently, the loaders who are picking the products rely on the fillers to have that product ready.**

(Tr. 478) (emphasis added). Contrast this testimony with the Union's witness' own description about his limited interaction (as a driver) with the Inter-Branch shuttle drivers that are included in the Union's petitioned-for unit:

- Q: Are you familiar with the shuttle drivers?
- A: Yes, sir.
- Q: Do you interact with the shuttle drivers at all when you're working?
- A: Yeah, **we talk**.
- Q: When do you interact with the shuttle drivers?
- A: In the morning if I'm waiting for get checked out or just walking at the plant.
- Q: Have you ever been asked -- or ever performed a shuttle driver run?
- A: **No, sir.**

(Tr. 891) (emphasis added). Thus, the evidence establishes daily interaction and collaboration between drivers and Loaders. There is no evidence establishing the same for Delivery drivers with other Delivery drivers, let alone Delivery drivers with Interbranch drivers.

Indeed, the record evidence illustrates that drivers and Loaders have skills and functions in common. The Region erred by finding it was "rare" for drivers to perform loading work on facility premises and discounting the common functions performed by Delivery drivers and Loaders. There is no set percentage or amount of time that must be spent by a class of employees performing common work tasks in order for the Board that it is appropriate for those employees to be included

in a single unit. The Board has found commonality of job functions to be a significant factor even when employees spend as little as 5% of their time performing the same tasks as excluded employees. *Boyden Logging, Inc.*, 164 NLRB 1069 (1967) (where employer's drivers, who spent as little as 5% to as much as 25% of their time not behind the wheel of the truck performing other job-related duties, and who had "integration of functions" were found to share a strong community of interest with other Production employees such that a separate unit was not allowed by the Board).

The Region neglected to address the *Boyden Logging* case or *Donald Carroll Metals, Inc.* 185 NLRB 409 (1970), another case cited by Airgas in which the Board found that drivers needed to be included alongside production employees, even though the drivers spent the vast majority of their time delivering and returning goods to the employer's facility and their remaining time "scal[ing], load[ing] and unload[ing] the trailers." See Airgas' Post-Hearing Brief at 26; see also *Standard Oil Co.*, 147 NLRB 1226 (1964) (including drivers and production employees in same unit where all employees had the same overall supervision, same benefits, and were paid on the same basis).

#### **iv. Interchange and Contact Among Employees**

The Regional Director further discounted the daily interchange and contact among Distribution drivers, Production drivers, and other Production employees by ignoring substantial record evidence that Delivery Drivers spend a significant portion of time interfacing with Loaders, including working at least 45 minutes a day to complete the unloading process. See *Atchison Lumber & Logging Co.*, 215 NLRB 572 (1974) (holding it was appropriate to include production, maintenance and truck drivers in the same unit, based in part on the fact that "drivers have regular contact with other employees at the landing where the logs are loaded onto their trucks"). The Regional Director effectively ignored the lengthy record evidence that Delivery drivers interact

with Loaders and fillers on a daily basis, and regularly with other Production employees, including times when a Lab Technician delivered cylinders with a Delivery driver. (Tr. 74-77, 121, 144, 147, 476-77, 576-77, 583-84, 608-10, 757, 761-63). Indeed, the Union's witness admitted to the frequency of the interaction, and Merideth, Chop, Espino, Squibb, and Dunlap<sup>8</sup> confirmed the same. (Tr. 342, 692, 478, 730, 732, 742, 843-44). This amount of contact and interaction is more than enough to weigh in favor of including drivers and all Production employees in a single unit.

**v. Degree of Functional Integration**

In performing the community-of-interest analysis, the Regional Director misapplied the law regarding functional integration. The Region took the position – *without citing any authority* – that “if functional integration does not result in contact among employees in the unit sought by a union, the existence of functional integration has less weight.” Decision at 24. First, as noted above, the functional integration of Airgas' operations *does* result in significant daily contact among the petitioned-for employees and the excluded employees – Delivery drivers and Loaders spend a substantial amount of time interacting and working together on a daily basis. In contrast, the record is nearly void of any evidence about the interaction between drivers with other drivers – including inter-branch drivers. (Tr. 478, 514, 692, 843-44, 891).

Further, the Region addressed only one of the several Board cases cited by showing that functional integration is a significant factor when positions are codependent and the operation's output is the result of an integrated process, whether the petitioned-for employees and excluded employees work alongside each other or not. *See The Boeing Co.*, 368 NLRB No. 67, slip. Op. (Sep. 9, 2019) (holding it was “particularly compelling” that petitioned-for employees had high

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<sup>8</sup> Jason Merideth (“Merideth”), Area Distribution Manager for North Texas; Joshua Chop (“Chop”), Plant Manager for the Grand Prairie plant; Rosendo Espino (“Espino”), Plant Manager for the Fort Worth plant; Robert Squibb (“Squibb”), Safety and Compliance Specialist for the Southwest Region; and Jason Dunlap (“Dunlap”), Lab Technician at the Grand Prairie plant.

degree of functional integration with excluded employees); *Potter Aeronautics*, 155 NLRB 1077 (1965)(noting that “the various components of the Employer’s products pass back and forth between employees in both the machine shop and electronics departments in the normal course of manufacture and assembly” in ordering unit of production and maintenance employees); *Atchison Lumber & Logging Co.*, 215 NLRB 572 (1974) (holding “[i]n performing the overall function of the Employer, the work of each job classification is dependent on the operation of the other classifications in such a way that any termination or slowdown of work in one part of the logging operation will affect the balance of the operations.”).<sup>9</sup> This case law, which the Regional Director ignored (and in the case of *Atchison Lumber*, misapplied), supports Airgas’ argument that the petitioned-for Production and Distribution drivers and the excluded Production employees have functionally integrated roles in Airgas’ business and should be included in any appropriate unit.

#### **vi. Terms and Conditions of Employment**

The Regional Director cited numerous common terms and conditions of employment the petitioned-for drivers share with Production employees, including “hourly wage rate; the same area-wide Airgas benefits; the same Airgas-wide policies, procedures, and work rules as set forth in the Employer’s employee handbook; and the same uniforms, restrooms, and parking lots.” Decision at 25. The dissimilarities the Regional Director cited were the wage scale (drivers generally have a higher wage rate) and the fact that the facilities have implemented specialized training related to driving and production duties. In conclusory fashion, the Regional Director stated “[t]hese factors weigh in favor of finding that the petitioned-for unit of drivers at the Grand

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<sup>9</sup> The Region attempted to distinguish *Atchison Lumber* by stating that the Board in *Atchison Lumber* “importantly noted that ‘[i]n appropriate cases, the Board has found that truck drivers may constitute separate units where the drivers are a functionally distinct and homogenous group whose duties and interests are different from other employees.’” Decision at 24. The Regional Director, however, ignored the evidence cited above regarding shared job duties and frequent contact between drivers and Production employees, and the Region did not attempt to articulate how Airgas’ drivers’ interests – particularly in the context of collective bargaining – were different from the Production employees the Union excluded from the petitioned-for unit.



Prairie facility alone is appropriate.” *Id.* The Regional Director, however, made no effort to articulate how a slightly different wage scale and some position-specific training represented “*meaningfully distinct*” interests *in the context of collective bargaining* that outweigh the significant commonalities between the groups. It is plain that these are not meaningfully distinct interests in the context of collective bargaining.

**5. The Region Erred in Ignoring the Historical Precedent Supporting Inclusion of Production Employees with the Petitioned-For Unit**

The third prong of the *PCC Structurals/Boeing* analysis requires the Board to analyze any historical precedent relevant to the appropriateness of the unit. In this case, Airgas’ Post-Hearing Brief cited a substantial amount of historical precedent in support of its argument that Production employees must be included in the unit alongside Production and Distribution drivers. Airgas’ Post-Hearing Brief at 24-27. That case law, most of which was ignored by the Region, is cited and discussed above. The Region erred in ignoring this historical precedent<sup>10</sup>. *See, e.g., Standard Oil Co.*, 147 NLRB 1226; *Calco Plating, Inc.*, 242 NLRB 1364; *Atchison Lumber & Logging Co.*, 215 NLRB 572; *Donald Carroll Metals, Inc.*, 185 NLRB 409; *Boyden Logging, Inc.*, 164 NLRB 1069.

As illustrated by a careful review and analysis, the record evidence overwhelmingly establishes that the Region failed to carefully consider and apply the community of interest factors as refined by *Boeing*. 368 NLRB No. 67. As a result, the Regional Director’s decision must be overturned.

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<sup>10</sup> The Regional Director paid mere lip service to the Board precedent in a footnote of his Decision: [W]hile the Employer lists multiple other Board cases in its brief referencing them as “historical precedent” supporting the inclusion of drivers and Production employees in a single unit, I note that “there is nothing the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit, the Act only requires that the unit be ‘appropriate.’” Decision at 24 (Citations omitted), fn. 29.

**B. Airgas Rebutted the Single-Site Presumption and Presented Evidence Establishing That A Multisite Unit Is The Only Appropriate Unit**

The Regional Director decided that a multi-site unit is not appropriate and that Airgas did not rebut the presumptively appropriate single-site unit. (Decision at 13). The Regional Director's Decision is in error.

**1. Relevant Board Law**

With respect to unit determinations of employees at single versus multi-location units, the Board holds that a petitioned-for single-facility unit is presumptively appropriate. *WeCare Transportation, LLC*, 353 NLRB 65, 67 (2008). Unless, that is, the unit has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Id.*; *J & L Plate, Inc.*, 310 NLRB 429 (1993). The party opposing the single-facility unit has the burden of rebutting its presumptive appropriateness. *Id.* The Board, however, "has never held or suggested that to rebut the presumption a party must proffer 'overwhelming evidence ... illustrating the complete submersion of the interests of employees at the single store,' nor is it necessary to show that 'the separate interests' of the employees sought have been 'obliterated.'" *Petrie Stores Corp.*, 266 NLRB 75, 76 (1983).

The Board examines a number of community-of-interest factors to determine whether the single-facility presumption has been rebutted:

- (1) Central control over daily operations and labor relations, including the extent of local autonomy;
- (2) Similarity of employee skills, functions, and working conditions;
- (3) The degree of employee interchange;
- (4) The distance between the locations; and
- (5) Bargaining history, if any exists.

*WeCare Transportation, LLC*, 353 NLRB at 67; *J & L Plate, Inc.*, 310 NLRB at 429; *R & D Trucking, Inc.*, 327 NLRB 531 (1999).

While single-facility units are presumptively appropriate, the presumption is clearly rebuttable. The Board is no stranger to finding that a system-wide or multi-site facility constitutes the only appropriate unit:

- *Dayton Transport Corporation*, 270 NLRB 1114 (1984) – Where the only appropriate unit was a system-wide unit of three (3) terminals. That case, involved drivers frequently assigned to work from terminals other than where they were typically stationed;
- *Purolator Courier Corp.*, 265 NLRB 659 (1982) - Various terminals in the employer's south-central region of the employer's Delivery system was held to be the only appropriate unit. Demonstrating the integrated nature of the various terminals, the Board was persuaded by the fact that employees were constantly moving from terminal to terminal;
- *Eastman Interiors, Inc.*, 273 NLRB 610 (1984) - Functional integration, frequent temporary and permanent transfers and the proximity of facilities established that a multi-facility unit of warehouse/showrooms was the only appropriate unit.

2. **Airgas has satisfied its burden in demonstrating why a multi-facility unit is the only appropriate unit.**

Here, the Regional Director ignored or mischaracterized the record evidence that clearly favors a multi-site unit. The Regional Director erroneously noted that there is “a nearly complete lack of employee interchange and contact . . .” Decision at 20. The Regional Director continued, “the degree of local autonomy as demonstrated by **the existence** of separate supervisory management for each location . . .” *Id.* These conclusions failed to carefully consider the lengthy record evidence that establishes that the three-plant unit has been so effectively merged into a more comprehensive North Texas Area operating unit, so functionally integrated, that each has lost its

separate identity. As evidence of record illustrates, Airgas has satisfied its burden in demonstrating that the only unit appropriate must encompass the three North Texas Area facilities at issue.<sup>11</sup>

**a. Airgas North Texas Area Management has central control over daily operations and labor relations.**

Airgas' evidence demonstrating control over daily operations and labor relations is irrefutable. (Tr. 425). In his Decision, the Regional Director concluded that there was local supervisory autonomy. Decision at 14. There was, however, no evidence of local supervisory authority to operate without coordinating with Merideth, on the Distribution side. (Tr. 343). Indeed, Merideth is involved in approving overtime, and also involves his direct leader Bill Ziots in that decision. (Tr. 71). Similarly, Plant Managers Chop and Espino presented numerous examples where they collaborated and coordinated, while also including Redding (Operations Manager, North Texas Area) in that decision-making process. (Tr. 343). Airgas introduced testimony through each of its witnesses establishing central control over daily operations between the Production and Distribution Departments. (Tr. 71, 329, 333, 343-45, 348, 355, 361, 399-400, 404). From hiring together for job openings at Grand Prairie and Fort Worth<sup>12</sup>, to daily interaction between these two departments to complete deliveries to Airgas customers in the North Texas area, to temporary transfers from Grand Prairie Delivery Drivers to Fort Worth or Dallas, or week-long transfers for Grand Prairie Production employees to Fort Worth, daily operations are inextricably intertwined. (Tr. 425). Further, it is irrefutable that labor relations are centralized. (Tr. 423). The same handbook and safety policies apply to all three facilities. (E. Ex. 17). Each plant does not have the ability to establish its own labor relations policies.

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<sup>11</sup> Indeed, the Region Director's failure to grasp the significant facts that the three (3) plants are only physically separated due to the fact that the North Texas production and distribution capacity is the product of mergers and acquisitions. The operations of the plants, however, are centrally coordinated and functionally interdependent.

<sup>12</sup> The Regional Director's reference to this as a "one-time occurrence" (Decision at 15) is not supported by the record.

**b. Similarity of employee skills, functions, and working conditions.**

Airgas presented several examples of the overlap in employee skills, functions, and working conditions. (Tr. 250-51; E. Ex. 13-14). By far, the majority of Distribution and Production employees are forklift certified. (Tr. 476-78; E. Ex. 14). From the Production Coordinator helping prepare and coordinate orders, to the Production Operators I, II, and III dovetailing work to blend, sort, fill, and load product onto the Delivery Driver's truck and Production Driver's truck, all work together in a synchronized effort to service Airgas' customers in the North Texas Area. (Tr. 342, 692, 478, 730, 732, 742, 843-44). Regarding working conditions, the commonalities outweigh potential distinctions. Indeed, Distribution and Production employees at all three (3) North Texas facilities share common parking lots, locker rooms, cafeterias, policies, training, and centralized payroll. (Tr. 173, 176-81; E. Ex. 4, 6-7.). The parking and building access to the three facilities is shared. (E. Ex. 4, 6-7.). The commonality of work functions is even greater at the Dallas and Fort Worth plants due to the smaller workforce and the need for employees to perform multiple tasks. (Tr. 775, Decision at 11). Consider Filler Erik Perez' relevant testimony: "I know when we were short on Loaders, I was out loading trucks for about . . . two months." (Tr. 775) (emphasis added).

**c. The degree of employee interchange.**

Record evidence established various instances of employee interchange, from management to rank-and-file employees. Regarding Delivery drivers, Merideth specified various examples, temporary and permanent, involving Delivery drivers between Grand Prairie and Fort Worth. (Tr. 191-98). Contrary to the Regional Director's Decision that there is "rare employee interchange among the drivers . . ." undisputed record evidence demonstrated that the Interbranch shuttle drivers employed at the Grand Prairie and Fort Worth production operations, by their nature, regularly work at the other production plants, delivering product and picking up product and empty

canisters. *See* Decision at 17, (Tr. 92). Temporary transfers of Delivery drivers often are used to cover Interbranch shuttle drivers vacations, absences, and to reduce excessive overtime. (Tr. 614-16, 633-35). These temporary transfers happen routinely. (Tr. 614). Fort Worth Delivery drivers regularly report to Grand Prairie and run routes from there. (Tr. 53-54, 57). Vice versa, there are examples of Delivery drivers from Grand Prairie reporting from Fort Worth to help cover the deliveries scheduled from that facility. (Tr. 54, 57, 212-13, 421, 614-16). Permanent transfers within the driver ranks include a pre-Grand Prairie Banning Street shuttle driver transferring to Fort Worth. (Tr. 57).

There is also substantial interchange between Production employees at the three facilities. During the hearing, Airgas presented examples of four (4) Production Operators who usually report to Grand Prairie, but worked out of Fort Worth temporarily. (Tr. 499-500: 668). There have also been permanent transfers, with Plant Manager Chop identifying four recent examples:

- William Atkins transferred from Fort Worth to Grand Prairie, and became a Production Operator I;
- William Romero is a Production Operator II in Fort Worth and transferred to Grand Prairie;
- Erik Perez was a Production Operator II in Grand Prairie, is now at Fort Worth holding the same job; and
- Heron Espino (“Heron Espino”) transferred from Fort Worth to Grand Prairie, keeping his job as a Production Operator II.

(Tr. 669). Management examples include Merideth, now Distribution Manager at Grand Prairie but previously Distribution Supervisor in Fort Worth; Espino, now Plant Manager at Fort Worth but previously Assistant Plant Manager at Grand Prairie; and Squibb, now Safety Specialist over the North Texas Area but previously Plant Manager at Grand Prairie. (Tr. 310, 312, 330, 403, 430, 470, 643).

While the Regional Director disagreed with the record evidence, the Board has previously held that this point is not dispositive of the multi-facility analysis. In *Jerry's Chevrolet, Cadillac*, the Board found that employer rebutted the single-facility presumption and the appropriate unit had to include all four (4) of the employer's facilities even though there was no meaningful interchange among them. *Jerry's Chevrolet, Cadillac*, 344 NLRB 689, 693 (2005). The Board reached this conclusion by focusing on the close proximity of the facilities in question, the centralization of labor relations, the high functional integration of the facilities, and the similarity of skills, pay, and job functions at all locations. *Id.* at 690-91.

In this case, there is significant evidence of interchange. The Regional Director's findings are not supported by the record.

**d. The distance between the locations.**

The geographic proximity between the three facilities highlights the integrated and interrelated nature of Airgas' North Texas operations: approximately 15-16 miles separate Grand Prairie from Dallas; approximately 24 miles separate Fort Worth from Grand Prairie; and approximately 32 miles separate Fort Worth from Dallas. (E. Ex. 2-3). The overlap between the customers that all three facilities cover to service Airgas' North Texas customers illustrate how interrelated they are. (E. Ex. 4-5). The close geographic distance between the facilities is evidenced by the interchange of Production and Distribution employees who temporarily transfer between facilities. The Board has routinely approved multi-location units of facilities located further apart. *Stormont-Vail Healthcare, Inc.*, 340 NLRB 1205, 1205, 1208 (2003) (distances of 10 to 70 miles from main facility did not warrant excluding outlying facilities from unit; *Capital Coors Co.*, 309 NLRB 322, 325 (1992) (distance of 90 miles between facilities did not preclude finding a community of interest).

The Region improperly downplayed the geographic proximity of the facilities finding “[W]hatever geographic proximity of the facilities argued by the Employer exists is outweighed by the employees’ lack of regular interchange or interaction with one another, separate supervision, different skills and training, and separated work facilities.”<sup>13</sup> (Decision at 19). The Regional Director’s analysis and reliance upon *Gordon Mills, Inc.* 145 NLRB 771 (1963), is misplaced. The North Texas Area plants operate as one integrated operation. The only reason there are separate plants and any geographic distance between them is because of the North Texas Production and Distribution operation is a product of mergers and acquisitions. (Tr. 19-21, 26; E. Ex. 2).

**e. Bargaining history, if any exists.**

Finally, the Regional Director’s Decision glossed over other information illustrating the highly interrelated nature among Airgas’ North Texas area plants. Decision at 20. Although there is no bargaining history within the three (3) facilities, Grand Prairie and Fort Worth have local safety committees, and both participate in district safety roundtables once a quarter where the safety committees discuss safety issues of mutual interest. (Tr. 502-05). Further, Airgas presented uncontroverted testimony of its Airgas Emergency Response Organization, featuring a Grand Prairie driver, and a Production operator/filler from Fort Worth. (Tr. 502-05).

As the Board can see, the Record evidence overwhelmingly establishes that Airgas satisfied its burden of proof in demonstrating that this unit must cover multi-facilities. As a result, the Regional Director’s decision must be overturned.

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<sup>13</sup> Even the Regional Director acknowledges, “the Employer’s evidence represented with regard to cross-training of employees among facilities...” Decision at 19.



**3. The Regional Director's Direction of a Mail Ballot Election is an Abuse of Discretion, as it Contravenes Board Precedent, the General Counsel's Memorandum, and the Stipulated Agreement of the Parties, Without Record Support.**<sup>14</sup>

**a. The Petitioner and Employer Desire a Manual Ballot Election.**

At the Hearing, the parties stipulated to their preference for a manual ballot election in the event the Regional Director directed an election. *See* Bd. Ex. 2. Indeed, the parties stipulated to follow the conditions and COVID-19 protocol outlined in GC Memorandum 20-10. *Id.* In his Decision, the Regional Director recognized the Board's strong preference for manual ballots, but then ordered a mail ballot election on the general conditions of the pandemic's presence in Dallas County. *See* Decision at 26-33.

While the Regional Director's Decision talks generally about COVID-19 and its presence as of August 27 in Dallas County, the Decision offers little explanation specific to the Employer's Grand Prairie plant (where a full complement of employees are and have been working daily during the pandemic), or how the additional safeguards offered by the Employer and outlined by the Board's General Counsel fail to ensure the safety of all involved in this particular election. Even the Exhibits of meeting areas in the Employer's facility illustrate the clear ability to conduct an election with more than sufficient space for social distancing for the Board agent, election observers, and voters. *See* 16-RC-262896 E. Ex. 6.

Although the Board allowed mail ballots elections over the first few months of the pandemic, the unknown risks of COVID-19 have significantly diminished: it is part of daily life for Airgas and its employees who report to work every day to perform essential work. Further, the spread of the pandemic has since declined as both employers and the general public adapt to what

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<sup>14</sup> On September 8, 2020, Airgas filed its Emergency Motion to Stay Mail Ballot Election, with the Board. There, Airgas addressed many of the arguments raised in this section.

increasingly appears to be a new normal. Indeed, the General Counsel has recognized this by issuing guidelines to conduct manual elections safely in the wake of COVID-19. GC Memorandum. 20-10, *See, e.g., id.*; *Victory Wine Group, LLC*, Decision and Direction of Election, No. 16-RC-257874, slip op. at 5-7 (Reg'l Dir., Apr. 23, 2020), The Board's recent decision in *Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020) illustrates the Board's own recognition that it is an abuse of discretion for a Regional Director to order a mail ballot election based on the mere existence of the pandemic. For eligible voters, all of whom report to the Airgas Grand Prairie plant every day, a manual election poses no additional risk.

Notably, the Grand Prairie plant functions in accord with all guidelines of the Centers for Disease Control ("CDC"). All of the following precautions (and others) are in place at the plant:

- Increased employee-wide communications regarding health and safety protocols;
- Additional cleaning resources and enhanced cleaning schedules to ensure sanitation;
- Additional cleaning supplies and sanitizers across the plant;
- High-touch surfaces repeatedly cleaned;
- Staggered and revised start, break, and lunch periods;
- Seating and/or common areas revised or closed;
- Physical markings on floors to maintain proper social distancing;
- Mandatory adherence to handwashing protocols;
- Provision and mandatory use of face masks; and
- Pre-shift screening procedures<sup>15</sup>.

In addition, there have been no recent known work-related COVID-19 exposures at the Grand Prairie plant. The Employer has put its plant and employees in a safe position with strict, mandatory protocols.

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<sup>15</sup> While the Company believes the matter petition should be dismissed (*see* Bd. Ex. 2), the two other facilities practice the same COVID-19 guidelines as Grand Prairie.

**b. The Regional Director's Findings**

While recognizing all of the measures the parties could take to ensure social distancing, limited exposure, and heightened sanitation, the Regional Director directed a mail ballot election. The Regional Director came to this conclusion even though an election would follow the same safety protocols already in place at the Grand Prairie plant, which means, in fact, the existence of an election does not increase potential transmission rates at all because these interactions exist with or without the voters being able to participate in a manual ballot election that maximizes voter participation.

The Region's Decision runs roughshod over the Act's charge, and the Board's statutory duty, to protect employee choice by elevating a hypothetical safety risk over the record facts that Airgas has existing measures in place and other measures are proposed (fully consistent with the GC Memorandum 20-10) to safely conduct a manual ballot election at the Grand Prairie facility. Indeed, if the Regional Director sought to protect employee free choice, a manual election would occur because a manual election would not increase employee interaction or proximity or exacerbate COVID-19 concerns.

**c. Applicable Legal Standards**

**i. The Regional Director Erred in Ordering a Mail Ballot Election.**

The Regional Director erred by misapplying the holding of *San Diego Gas & Electric*, 325 NLRB 1143 (1998) and the NLRB's *Casehandling Manual Part Two: Representation Proceedings* ("Casehandling Manual"), Section 11301.2 ("Manual or Mail Ballot Election: Determination"). *San Diego Gas & Electric* establishes that Regional Directors should consider mail ballots in at least three (3) situations: scattered voters, scattered schedules, and strike or

lockout situations. 325 NLRB at 1145. The Board left open the possibility that other extraordinary circumstances may be relevant to election-type decisions. *Id.* at 1145, n.6.

Board precedent in representation cases rests upon the critical threshold consideration of which method of election best advances employee choice (voter turnout, ease of participation, etc.). Mail or mixed ballot voting only exists when necessary to “enhance the opportunity of all to vote.” *Casehandling Manual*, section 11301.2. *San Diego Gas & Electric* stands for the same principle: “[e]xtraordinary circumstances” mandating a mail ballot election may occur when the Regional Director “might reasonably conclude that [voters’] opportunity to participate in the election would be maximized by utilizing mail or mixed ballot election methods.” 325 NLRB at 1145. Specifically, a Regional Director must tie their exercise of discretion, even in cases of extraordinary circumstances, to the Board’s proper role in ensuring employee participation and free choice. *Id.* at 1145 n.10 (“A Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient and likely to enhance the opportunities for the maximum number of employees to vote.”).

Here, the Regional Director’s attempt to analyze case-specific factors is insufficient. First, the Regional Director relied on pandemic statistics in Dallas County and the state of Texas, despite the latter having one of the largest populations in the country. Decision at 29. Second, the Regional Director erred when he relies on speculation that “if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election . . .” Decision at 29. This conclusion is too speculative to be reliable. The same could be true for an employee with the common flu or any other health condition, conflicting family commitment, etc. The Board does not require that “all” employees be able to attend when selecting

a date best suited for a manual election. Instead, the Board looks at when the majority of employees are scheduled to work and are capable of exercising their right to vote. Denying employees their right to vote by manual ballot – consistent with the preference identified by the parties – is unfounded, and the Board must reverse that decision.

**a) Mail Ballot Elections Result in Reduced Voter Turnout.**

Recent data definitively and empirically demonstrate that mail ballot elections significantly **diminish** turnout. During the week of March 7 to 13, 2020, more than 93% of manual ballots had a participation rate above 80% — only two out of thirty elections (6.7% of manual elections) resulted in lower rates. *See Wainfleet Co.*, No. 03-RC-256434 (63% rate); *Growing Seeds at Crystal Springs, Inc.*, No. 19-RC-256529 (75% rate). Yet, from March 14 to June 9, Regional Directors exclusively ordered mail ballot elections and ***nearly 40% of elections had a participation rate of 80% or less***. Indeed, COVID-19-related mail ballots have resulted in a very significant decrease in voter turnout compared to typical manual ballot elections. *See, e.g., Paragon Sys., Inc.*, No. 09-RC-259023 (55%); *River Mkt. Comm. Co-op* No. 18-RC-256986 (54%); *Univ. Protection Serv., LLC*, No. 10-RC-257846 (52%); *Triple Canopy, Inc.*, No. 27-RC-257463 (37%); *Am. Sec'y Programs, Inc.*, No. 05-RC-256696 (36%); *Children & Adult Disability Ed. Servs.*, No. 04-RC-256028 (40%).

Further, in *Fontanini Foods, LLC*, the Regional Director **twice** extended the mail ballot period because of low turnout. *Id.*, No. 13-RC-257636 (Reg'l Dir. June 29, 2020). In that case, the Region commingled ballots and counted on June 17, 2020. After low turnout, the Regional Director extended the initial mail ballot period until July 1, 2020. The Regional Director then extended the period for a second time, until July 8, 2020, because only 227 of 401 (56.6%) mailed ballots had been returned as of June 29. Other troubling issues also arose in that case, including: some

employees had to pay to receive the NLRB package, missing ballots, duplicate ballots, and a few employees attempted to contact the NLRB but never heard back about ballot issues. Ultimately, the Region only tallied 216 ballots in that case (despite claiming to have had 227 as of June 29). All of these circumstances raise significant concerns as to the regularity and integrity of the mail ballot election process – one of the hallmarks of the manual ballot process and its simple, transparent procedures. The Regional Director’s decision at best pays lip service to these concerns in noting that, under other circumstances, he would direct a manual election. But this does nothing for the employee voters in this case who are potentially disenfranchised by the Region’s decision. The Region is the only party opposing a manual ballot.

If voter turnout is of the utmost importance in representation cases, and the Board generally favors manual elections over mail ballot elections, the Board should overturn the instant decision. Again, here, eligible voters come to work every day – they will be present in the facility, election or no election. Furthermore, election or no election, they will safely interact just as much and in just the same fashion, following Airgas’ COVID-19 protocol, wearing masks, and observing appropriate social distancing. They should receive one of the major quintessential protections of the Act: a manual, secret ballot election.

**b) The Regional Director Should Have Assessed Safety Specific to the Circumstances and Precautions at the Employer’s Facility.**

As part of the stipulation entered into evidence during the hearing, Airgas detailed its commitment to comply with all safety protocols outlined GC Memorandum 20-10. Following all the safety protocols in GC Memorandum 20-10, which includes conducting the election with sufficient social distancing, Airgas is committed to providing an environment that will allow employees to participate in a manual ballot election while doing nothing to increase COVID-19

transmission risk. In terms of safety, no reason exists to justify rejecting the parties' stipulated agreement to a manual election.

The Regional Director claimed the election would require voters who do not work together to have to interact, even though they all work together every day in the exact same setting. Social distancing procedures are already in place to allow people to come together in a safe manner, and there is no reason to believe they would not be observed while voting, just as they are while working, while on break, and while entering and leaving the facility. The Board has never based decisions on the mere possibility of future negative circumstances, much less when it is more likely that a positive possibility exists.

The Regional Director's decision ignored the specific safety situation and protocols at the plant and, instead, overly focused on the general state of the pandemic and hypothetical negative possibilities. At the same time, he gave little consideration to the legal precedent and facts favoring a manual ballot election. This was in error.

**c) The Regional Director's Decision Violates Current Board Election Jurisprudence and is Inapposite to NLRB General Counsel's Memorandum 20-10.**

The Board reactivated election proceedings in an April 17, 2020, announcement entitled "COVID-19 Operational Status," stating, "[c]onsistent with their traditional authority, Regional Directors have discretion as to when, where and if an election can be conducted, in accordance with NLRB precedent." We are aware of other elections that were held in-person following the lifting of the election moratorium, and there has been no report of any problems with any such election. For example, in Byhalia, Mississippi, Hearthside Food Solutions LLC workers successfully voted in person without issue. *Hearthside Food Solutions LLC*, Case No. 15-RC-258901 (Region 15 June 3, 2020). There, the parties agreed to implement several safety measures, including: erecting Plexiglas barriers to separate workers, Board employees, and election overseers; using disposable pens and

pencils; marking off spaces at 10-foot intervals; providing masks and gloves; and separating the entrance and exit so workers would not pass each other.<sup>16</sup>

With the experience of these elections, and the benefit of a variety of health information regarding the pandemic, on July 6, 2020, the Board's General Counsel, Peter B. Robb released GC Memorandum 20-10 on "Suggested Manual Election Protocols." (*See* GC Mem. 2010). GC 20-10 outlines numerous election protocols to ensure a safe election. Airgas committed to comply with all the procedures listed. The Employer will implement every suggestion in the GC Memorandum practicable, and will work with both the Region and the Petitioner regarding any additional concerns.

Other Regions have successfully operated manual elections subject to social distancing procedures, or directed manual elections subject to the parties agreeing to follow social distancing procedures. *See, e.g. Watson Bowman Acme Corp.*, No. 03-RC-262231 (August 19, 2020 election); *Gulfport Energy Corporation*, No. 08-RC-263572 (September 10, 2020 election). The Board has recognized that elections can be safely conducted following these safeguards. *Aspirus Keweenaw, supra*.

In light of these facts, the Regional Director's actions fail to follow precedent or the guidance of GC Memorandum 20-10. Simply put, the Regional Director abused his discretion by rejecting the parties' preference for a manual ballot without any case-specific justification. The false presumption that social distancing cannot occur during an election is insufficient to support the instant Decision. There is no good reason that a manual ballot election cannot be done here.

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<sup>16</sup> Airgas has offered to do all those things here.



**4. The Board Should Issue An Immediate Stay of Mail Ballot Distribution.**

The Decision indicates that the Region will distribute mail ballots on September 25, 2020. In order to prevent potential voter confusion and irreparable injury to the election process, the Board should issue an immediate stay of mail ballots in this case as it did in *Aspirus Keweenaw*, supra.


**III. CONCLUSION**

Considering the record evidence and legal authorities, the Board should find that the Regional Director's Decision is contrary to Board precedent. Alternatively, the Board should order a manual ballot election of all Drivers (Delivery, Shuttle, and Microbulk Drivers) and Production (Production Operator I, Production Operator II, Production Operator III, Production Lead, Operations Coordinator, and Lab Technician) employees at Airgas' Grand Prairie, Dallas, and Fort Worth facilities.

Dated this the 10<sup>th</sup> day of September, 2020.

Respectfully submitted,

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**AIRGAS USA, LLC**

**and**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 745**

**Case No. 16-RC-262896**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **REQUEST FOR REVIEW** was served on the following parties on this **10<sup>th</sup>** day of **September**, **2020**:

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